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Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1914

JANE MONELL, *et al.*, *Petitioners*,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL EDUCATION ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AS AMICI CURIAE

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INTEREST OF THE AMICI CURIAE [1]

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.5 million educators, virtually all of whom are employed by public educational institutions. One of NEA's purposes is to safeguard the constitutional rights of teachers and other public educators.

[1] The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 42(2) of the Rules of this Court.

The Lawyers' Committee for Civil Rights Under Law is a non-profit corporation organized in 1963 at the request of President Kennedy. Its Board of Trustees includes nine past presidents of the American Bar Association, two former Attorneys General, and two former Solicitors General of the United States. The Committee's primary mission is to involve private lawyers throughout the country in the quest of all citizens to secure their civil rights through the legal process.

The resolution of this case will have an important impact upon the extent to which those who are injured by the unconstitutional actions of public officials and entities can secure complete relief in the federal courts. Both *amici* have a vital interest in the resolution of this case.

This brief is filed to provide the Court with the views of *amici*, refined through extensive litigation under the Fourteenth Amendment and 42 U.S.C. § 1983, that actions can be maintained under § 1983 against public officials in their official capacities and against school boards to secure complete relief, including relief which impacts upon the public treasury.

SUMMARY OF ARGUMENT

Plaintiffs brought this action under § 1983 against a school board, a city department, and various public officials in their official capacities, alleging that these defendants had violated plaintiffs' rights by requiring them to stop working during their last two months of pregnancy. Cf. *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 638 (1974). As remedies, plaintiffs sought declaratory and injunctive relief (now

moot, because defendants have rescinded the policies which required pregnant employees to stop working), and payment of the salaries which they would have received but for the unconstitutional interruption of their employment.

The court below held that there is no federal jurisdiction over this action under 28 U.S.C. § 1343(3), because none of the defendants is a "person" who may be sued under § 1983. More precisely, the court held that the school board and city department can never be "persons" under § 1983, and that public officials in their official capacities are "persons" when sued for declaratory and injunctive relief, but are not "persons" when sued for retroactive monetary relief.

In Part I-A of this brief, we show that the court erred in holding that the public officials are not "persons" when sued for monetary relief under § 1983. Public officials in their official capacities are either "persons" suable under § 1983 or they are not. There is no basis for bifurcating their "person" status depending on the nature of the relief sought. *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). This Court has entertained and approved relief in numerous § 1983 cases against public officials in their official capacities. A finding, implicit or explicit, that such defendants are "persons" suable under § 1983 was a necessary predicate to this Court's resolution of those cases, particularly in light of this Court's duty *sua sponte* "to see to it that the jurisdiction of the [district court] . . . is not exceeded." *City of Kenosha* v. *Bruno*, *supra*, 412 U.S. at 511. Moreover, Congress has closely scrutinized these § 1983 decisions and has evinced no dissatisfaction with the definition of "persons" established therein. Too many important decisions of this Court have proceeded on the premise

that public officials in their official capacities are "persons" under § 1983 for the question to be considered other than settled. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306-307 (1962). It follows that there *was* jurisdiction under 28 U.S.C. § 1343 to entertain the monetary claim against the public officials.

Of course, even though there be jurisdiction over the claim, it would be defeated on its merits if it could be shown that Congress intended in § 1983 to restrict the forms of relief available against this category of "persons" so as to preclude monetary relief which would be paid from the public treasury. While the Court below did not address this "merits" issue, we go on in Part I-B to show that Congress did *not* intend to restrict the scope of available relief in this fashion. On its face, § 1983 creates a cause of action for "redress" by the "party injured" against "every person" violating constitutional rights, and creates the broadest possible avenue to relief: through "an action at law, suit in equity, or other proper proceeding." These words do not admit of the interpretation that Congress meant the "injured party" to go without "redress" when the injury is monetary and the wrongdoing "persons" are public officials. By logic, if Congress in enacting § 1983 had intended "to protect municipal treasuries," as the Court below stated, then it would have permitted no award against public officials which impacts on municipal treasuries. But, this Court has already decided in numerous cases that relief may be granted against public officials in their official capacities, and Congress has accepted, indeed built upon, these decisions. Further, the Eleventh Amendment "analogy" to which the court below refers, has no application here. The line drawn in Eleventh

Amendment cases between prospective and retroactive relief is a product of this Court's effort to reconcile competing constitutional interests; it makes no sense as a means to determine the intent of the 1871 Congress in enacting § 1983, and in fact leads to a distortion of the manifest congressional purpose. The importation of the Eleventh Amendment line into § 1983 would contravene the central purpose of § 1983—to provide a complete federal remedy for federal constitutional wrongs committed under color of state law—without serving any other purpose which the Congress that enacted § 1983 meant to achieve. The enactors did not intend to insulate municipal treasuries from suits to remedy constitutional wrongs. We detail the legislative history which proves this.

In Part II, we show that the court below also erred in holding that school boards are not "persons" under § 1983. As consistently as this Court has treated other governmental entities as outside the ambit of § 1983 and § 1343(3), so equally consistently (and in far greater volume) has this Court treated school boards as within the ambit of those provisions. In case after case, particularly in the school desegregation area, this Court has entertained § 1983 actions in which school boards were defendants, and indeed has on numerous occasions issued, directed, or approved orders in such cases against school boards. Congress has followed these decisions closely and has assumed from these decisions, and acted upon the assumption, that school boards are subject to suit by private parties. In 1964, 1972, and 1974, Congress enacted into law statutes founded on that assumption. In addition, Congress has failed to enact bills introduced from time to time to withdraw or limit federal court jurisdiction to entertain suits against school boards. In

the light of this history, the question whether school boards are "persons" under § 1983 must be regarded as settled in the affirmative. See *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 306-307; *Flood* v. *Kuhn,* 407 U.S. 258, 282-284 (1972). It follows that there was jurisdiction under 28 U.S.C. § 1343 to entertain the monetary claims against the school board, and that on the merits such relief may be awarded, where appropriate, under § 1983.

ARGUMENT

I. PUBLIC OFFICIALS IN THEIR OFFICIAL CAPACITIES ARE "PERSONS" WITHIN THE MEANING OF SECTION 1983. NO MATTER WHAT RELIEF IS SOUGHT AGAINST THEM. WHEN PUBLIC OFFICIALS USE THE POWERS OF THEIR OFFICE TO VIOLATE CONSTITUTIONAL RIGHTS, THEY MAY BE ORDERED TO USE THE POWERS OF THEIR OFFICE TO REMEDY THEIR VIOLATIONS EVEN THOUGH THE PUBLIC TREASURY BE IMPACTED.

As we understand it, the theory of this action, insofar as it is directed at public officials in their official capacities, is as follows: when public officials, exercising the powers of their office, violate the federal Constitution and thereby injure private parties, the injured parties may sue under § 1983, and the court is empowered to require the wrongdoing officials to exercise "the power that is theirs"[2] to repair the injury done—here, to pay the back salaries which plaintiffs would have received but for the officials' unconstitutional actions. The theory depends upon two propositions: (a) that there is jurisdiction to entertain such a § 1983 claim; and (b) that, on the merits, if the defendant public officials have the power to "make good

[2] *Griffin* v. *School Board,* 377 U.S. 218, 233 (1964).

the wrong done," § 1983 permits remedies which require those officials to exercise that power even where doing so impacts upon the treasury of the entity which they serve.[3] The court below found that plaintiffs' theory foundered on the first proposition—it held that as the public officials are not "persons," there is no jurisdiction to entertain the claim. The court did not reach or discuss the second proposition. We deal with both propositions herein.

[3] The theory is applicable only where the wrongdoing officials hold positions of responsibility empowering them to provide the relief sought. Not every act of misconduct by every municipal employee can lead to an order against him in his official capacity impacting upon the public treasury. The courts can do no more than order wrongdoing officials to exercise "the power that is theirs" to right the wrongs which they have committed through their offices. *Griffin* v. *School Board,* 377 U.S. 218, 233 (1964). See also *Swann* v. *Board of Education,* 402 U.S. 1, 30 (1971). Although a court may have jurisdiction over a public official, it cannot instill him with powers to undo his wrong which he does not possess by virtue of his office. The wrongdoing policemen in *Monroe* v. *Pape,* 365 U.S. 167 (1961), could not have been ordered to make their victims whole from the public treasury—their official powers did not extend that far. Nor could such relief have been directed at their superiors who *did* have such powers, for those superiors were not wrongdoers. As this Court explained in *Rizzo* v. *Goode,* 423 U.S. 362, 377 (1976), distinguishing *Swann* and *Brown*, relief may be obtained only against those responsible for the wrong:

> "Those against whom injunctive relief was directed in cases such as *Swann* and *Brown* were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their own conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution."

A. Public Officials in Their Official Capacities Are "Persons" Within the Meaning of § 1983, No Matter What Relief Is Sought Against Them, and the Federal Courts Have Jurisdiction Under 28 U.S.C. § 1343 To Entertain Claims for All Types of Relief Against Such "Persons."

The court below did not question that there would have been jurisdiction in the district court to hear and resolve plaintiffs' claims against the public officials had injunctive or declaratory relief been sought: "There is no doubt that municipal and state officials, sued in their official capacities, are 'persons' within the meaning of [42 U.S.C.] § 1983 when they are sued for injunctive or declaratory relief."[4] The court ruled, however, that these same defendants are not "persons" within the meaning of § 1983 when they are sued for monetary relief, and therefore that "[w]e are . . . without jurisdiction to hear this suit."[5]

The court below founded its analysis upon this Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), which held, *inter alia*, that in a suit for money damages a municipality is not a person within the meaning of what is now codified as § 1983. The court below reasoned as follows: (a) the Department of Social Services and the school board here are in effect part of the City of New York and thus, under *Monroe*, not "persons" in their own rights; (b) the monetary relief sought against the public officials in their official capacities would in fact come out of the treasuries of the Board of Education and the City of New York; consequently (c) the real parties in interest are the City and the Board and not the named public officials; and (d) suits against public officials may not be used

[4] Pet. A. 53-54.

[5] Pet. A. 60.

as a "subterfuge" to sue non-"persons," and thus jurisdiction does not lie under § 1343(3).[6] (We assume, for purpose of our argument in Part I, that as the court below held, school boards are not "persons." Of course if they *are* "persons," as we show they are in Part II, there could be no inhibition upon suits against school boards *or* their officials for relief impacting upon their treasuries.)

Significantly, the court below completed the foregoing analysis without dealing with this Court's decision in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) —a decision which cannot be reconciled with the holding below that public officials are "persons" for declaratory and injunctive relief but not for monetary relief. In *Kenosha*, this Court held that a municipality is not a "person" suable under § 1983 for *any* relief, declaratory or injunctive as well as monetary. Given the *Kenosha* holding, the logic of the court of appeals' analysis would apply equally to preclude jurisdiction of a claim for declaratory or injunctive relief against a public official in his official capacity, where the real impact of that relief would be felt by the entity which is not a "person." Just as with monetary relief, it could be said that to entertain a suit against the public official in his official capacity for such declaratory or injunctive relief would be sanctioning a "subterfuge" to accomplish indirectly what cannot be done directly.

[6] Pet. A. 55-61. Although recognizing that the Eleventh Amendment is inapplicable to this case, the court below thought that the case law developed under that Amendment furnished "a compelling analogy" for its ruling. *Id.* at 56. In fact, the analogy is wholly flawed. We defer our demonstration on this point to Part I-B, *infra*, for even if the analogy were valid it would go to the scope of the federal court's remedial power, not to its jurisdiction.

Kenosha found no evidence in the legislative history of § 1983 or in its language "to suggest that the generic word 'person' was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them." 412 U.S. at 513. The same is true as to public officials. The statute prescribes the same cause of action, in the same terms, against "every person." And there is not a word in the legislative history suggesting that public officials are "'persons" for some purposes but not others. Thus, there is no more basis here than in *Kenosha* for bifurcating the "person" status of the defendants. Regardless of the relief sought, there must be but a single answer to the question whether a public official in his official capacity is a "person" suable under § 1983.

That answer has already been provided by this Court in dozens of cases. For decades, this Court has entertained and decided § 1983 actions against public officials in their official capacities; indeed, all of the Court's school desegregation and legislative reapportionment decisions have been rendered in such actions.[7] In all of these cases the public entity was the "real

[7] The school desegregation cases are cited *infra* p. 28, n. 28. The legislative reapportionment cases include *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533, 537 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 635 (1964); *Davis* v. *Mann*, 377 U.S. 678, 680 (1964); *Roman* v. *Sincock*, 377 U.S. 695, 697 (1964).

Of course, in all the school desegregation cases, suit was brought not only against the public officials in their official capacities, but also against the school board itself. It is possible, therefore, that this Court entertained those cases because school boards are themselves "persons" under § 1983. In that event, those cases establish that there is no jurisdictional problem here, at least with respect to that portion of the case concerning school board employees, for here too suit was brought against the school board as well as against the public officials. See part II, *infra*.

party in interest," and in many the relief awarded impacted directly upon the entity's treasury.[8]

It is true that in none of these cases was the issue whether public officials in their official capacities are "persons" directly addressed. But a finding, implicit or explicit, that such defendants are "persons" suable under § 1983 was a necessary predicate to this Court's entertaining those cases and approving relief therein, particularly as this Court has recognized its duty—in the context of a case brought pursuant to § 1983 and § 1343(3)—*sua sponte* "to see to it that the jurisdiction of the [district court] which is defined and limited by statute, is not exceeded," *City of Kenosha* v. *Bruno*, *supra*, 412 U.S. at 511. It is not without significance that on the very day that *Kenosha* was decided, holding *sua sponte* that public entities may not be sued under § 1983, this Court affirmed an order in another § 1983 action directing a public *official* to reimburse excess tuition payments which had been improperly collected from students. *Vlandis* v. *Kline*, 412 U.S. 441, 444-445, 454 (1973).

Notwithstanding the absence of express consideration, these many decisions by this Court surely constitute *stare decisis* on the issue whether public employees in their official capacities are "persons" under § 1983. Too many important decisions of this Court have proceeded on that premise for the question to be considered other than settled. As this Court stated in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306-307 (1962):

> "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was

[8] We cite and describe these cases *infra*, pp. 15, 17.

> not questioned but was passed *sub silentio*, . . . neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years."

Adherence to the rule implicitly established by these § 1983 cases is particularly appropriate here, for the rule is one of statutory construction (rather than constitutional interpretation).[9] Congress has been free to change it, yet, despite close congressional scrutiny of the pertinent decisions, Congress has evinced no dissatisfaction with the rule.[10]

In sum, there is no room for a holding that public officials in their official capacities are not "persons" suable under § 1983, and the court below erred in ruling that there was no § 1343 jurisdiction over plaintiffs' claim against these defendants. There remains the "merits" question, which the court below did not reach, whether there are special limitations upon the relief which can be awarded against these defendants, and it is to that question that we now turn.

B. When Public Officials Use the Powers of Their Office To Violate Constitutional Rights, They May Be Ordered To Use the Powers of Their Office To Remedy Their Violations Even Though the Public Treasury Be Impacted.

It is a familiar principle of federal law that when a federal court has jurisdiction over a defendant who has violated constitutional rights, it will ordinarily

[9] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting), quoted with approval in *Edelman* v. *Jordan*, 415 U.S. 651, 671 n.14 (1974).

[10] Cf. *Flood* v. *Kuhn*, 407 U.S. 258, 282-284 (1972). We discuss the congressional response to the Court's desegregation decisions *infra*, pp. 15-16, 30-32.

require him to do what he can to repair the damage. "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).[11] On its face, § 1983 is such a statute. It creates a cause of action for "redress" by the "party injured" against "*every person*" violating constitutional rights, and prescribes the broadest possible avenue to relief: through "an action at law, suit in equity, or other proper proceeding." See also 42 U.S.C. § 1988. These words do not seem to admit of the interpretation that Congress meant the "injured party" to go without "redress" when the injury is monetary and the wrongdoing "persons" are public officials. In the face of this unequivocal statutory language, it is difficult to see any basis for not applying the ordinary rule that federal courts "will make good the wrong done." Any advocate to the contrary should be required to bear a heavy burden of persuasion.

The court below did not address this question in these terms, for it mistakenly disposed of the case on jurisdictional grounds. But it is easy to see from its

[11] "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 239 (1969). "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury," *Wicker* v. *Hoppock*, 6 Wall. 94, 98 (1867), reaffirmed in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-19 (1975). Justice Cardozo put the principle in these words: "Once let it be ascertained that the amount is determinable and all that follows is an incident . . . . [O]nce a wrong is brought to light[, t]here can be no stopping after that until justice is done." *Bemis Bros. Bag Co.* v. *United States*, 289 U.S. 28, 35-36 (1933).

opinion how it would have answered it: the court below thought that "the Reconstruction Congress which enacted the Civil Rights Act sought to protect municipal treasuries," [12] and no doubt would have concluded that Congress intended to restrict the relief available against public officials commensurately with that object. Although the *logical* implementation of such an understanding of congressional intent would be to permit no award against public officials which impacts on municipal treasuries, the court below, which perceived a "compelling analogy" in the Eleventh Amendment cases,[13] presumably would have precluded only awards of retroactive monetary relief.

We will show herein that in § 1983 suits against public officials neither the complete prohibition of awards which impact upon municipal treasuries nor the preclusion only of awards of retroactive monetary relief from such treasuries is a defensible result. In doing so, we will proceed as follows: First, this Court has already decided in numerous cases that relief may be granted which impacts upon the public treasury in § 1983 suits against public officials in their official capacities, and Congress has accepted, indeed built upon, those decisions. Second, the Eleventh Amendment "analogy" to which the court below refers is the product of this Court's effort to reconcile competing constitutional interests; it makes no sense as a means to determine the intent of the 1871 Congress in enacting § 1983, and in fact leads to a distortion of the manifest congressional purpose.

1. A construction that § 1983 precludes all awards against public officials impacting upon public treas-

[12] Pet. A. 59.

[13] Pet. A. 56.

uries could not be reconciled with the many decisions of this Court in § 1983 actions against public officials requiring the expenditure of enormous sums from local governmental treasuries—decisions which Congress has followed closely, legislated about, but never chosen to overturn.

Many of this Court's school desegregation decisions, for example, have required large expenditures from local government treasuries. The leading example is *Griffin* v. *School Board*, 377 U.S. 218, 233 (1964), where the Court authorized issuance of an order requiring public officials "to exercise the power that is theirs to levy taxes to raise funds" if necessary to reopen the public schools. And, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30, and n.12 (1971), the Court affirmed a busing order requiring "local school authorities" "to employ 138 more buses than [the school system] had previously operated."

Congress, aware that the Court has issued orders against public officials requiring them to expend public funds, has not amended either 42 U.S.C. § 1983 or 28 U.S.C. § 1343(3) to withdraw the federal courts' authority and/or jurisdiction to issue such orders; on the contrary, Congress has expressly declared its intention *not* to do so.

In 1974, Congress found that "the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amount[s] of funds, thereby depleting their financial resources . . ." 20 U.S.C. § 1702(a)(3). Congress' response was not to withdraw either jurisdiction or judicial power to require such plans, but simply to legislate revised eviden-

tiary standards and remedial priorities to be employed by the courts in deciding such cases.[14] And lest that step be misunderstood as a statutory withdrawal of judicial power or jurisdiction, Congress took care to declare expressly that "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b).[15]

Either the 1871 Congress really did intend to "protect municipal treasuries," or it did not. If it did, and if there had been no intervening developments, the solution would be clear: the Court would be required to "give effect to the legislative will," *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975), by forbidding all remedies in § 1983 actions which impact monetarily upon public treasuries. But, of course, there have been intervening developments: this Court has repeatedly approved just such remedies—both "prospective," as we have just shown, and "retroactive," as we show below— and the modern Congress has responded by expressly affirming its desire *not* to "modify or diminish" the power of the federal courts

[14] 20 U.S.C. §§ 1703-05, 1712-18, 1752-58.

[15] In 1972, Congress had similarly found that "the process of eliminating or preventing minority group isolation . . . involves the expenditure of additional funds to which local educational agencies do not have access." 20 U.S.C. § 1601(a). Then, too, Congress' response was not to cut back on the federal courts' statutory powers or jurisdiction, but rather to reaffirm the propriety of their exercise. Congress decided "to provide financial assistance" to enable local educational agencies to meet the demands of these court orders, 20 U.S.C. §§ 1601(b)(1), 1605(a)(1)(A)(i), and enlarged upon the remedies available in such actions by expressly authorizing attorney's fee awards, 20 U.S.C. § 1617.

to award such remedies. Under these circumstances, this Court's prior decisions must be taken to preclude a holding that public treasuries can never be affected.

2. A construction of § 1983 which would permit orders requiring public officials to spend public funds prosepectively, while precluding orders against such officials directing retroactive monetary payments from the public treasury, would also collide with prior decisions of this Court. In *Vlandis* v. *Kline*, *supra*, 412 U.S. at 444-445, 454, a § 1983 case, this Court affirmed an order requiring a public official to reimburse excess tuition payments collected in violation of constitutional rights. Similarly, in *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632, 638 (1974), a § 1983 case, this Court affirmed as "appropriate relief" a backpay award to pregnant teachers unconstitutionally suspended from employment (see 326 F. Supp. 1159, 1161 (E.D. Va. 1971)). Cf. *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (all opinions in this case either expressly declare or implicitly assume that, where the Eleventh Amendment is inapplicable, retroactive monetary relief from a public entity's treasury may be awarded in a § 1983 action against public officials in their official capacities).[16]

[16] *Edelman* was a § 1983 action brought against officials of the State of Illinois seeking, *inter alia*, an order requiring the defendants to provide benefits which would have been paid but for their unlawful delays.

The Court began its analysis with the recognition that the monetary award, although addressed to the public officials, would in fact be paid from the public treasury—in this instance, the *state* treasury. "These funds will obviously not be paid out of the pocket of petitioner Edelman . . . The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois." 415 U.S. at 664, 665. The Court then ruled, by a 5-4 vote, that such an award was precluded by the Eleventh Amendment.

For present purposes, the important part of *Edelman* is not

But, even passing these prior decisions, nothing can be found on the face of § 1983 or in its legislative history to justify distinguishing between prospective and retroactive relief. Such justification as can be made for such a distinction must come not from anything internal to § 1983 or its background but from the "compelling analogy" of this Court's Eleventh

its construction of the Eleventh Amendment—as we show below, the Eleventh Amendment is inapplicable here because it protects only state treasuries, not local school board treasuries—but the apparent unanimity on the Court that *but for* the Eleventh Amendment the monetary relief would have been recoverable under § 1983 despite the fact that it came from the treasury of a public entity (the State) not itself a "person" under § 1983.

Initially, it is apparent that, if § 1983 did not authorize monetary awards against public officials payable from public funds, there would have been no occasion for the Court to discuss the Eleventh Amendment at all in *Edelman*. Pursuant to the policy of avoiding unnecessary constitutional adjudication (*see, e.g., Hagans* v. *Lavine*, 415 U.S. 528, 546-547 (1974)), the Court need only have declared that § 1983 itself did not authorize the award, and the case would have been over. Only if the Court was of the view that § 1983 otherwise *would* reach the public treasury was it appropriate to reach the constitutional question whether the Eleventh Amendment dictated a contrary result.

All four dissenters in *Edelman* (including the author of *Monroe* v. *Pape*) would have allowed the recovery against state officials even though it was to be paid from state funds. 415 U.S. at 678-687 (Douglas, J., dissenting); *id.* at 687-688 (Brennan, J., dissenting); *id.* at 688-696 (Marshall, J., joined by Blackmun, J., dissenting). The majority, of course, disagreed, but not because of any limitation found in § 1983 itself. Rather, the majority concluded that the Eleventh Amendment constituted an independent restriction upon the scope of relief available in federal court. 415 U.S. at 677:

> "Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, *consistent with the Eleventh Amendment*, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . ." (emphasis added; footnotes omitted).

Amendment decisions.[17] As we show, this "analogy" cannot bear examination.

The distinction between retroactive and prospective relief for purposes of the Eleventh Amendment does not purport to be an expression of the will of the framers of that Amendment. Rather, it represents the culmination of this Court's effort—begun with the creation of the fiction of *Ex parte Young*, 209 U.S. 123 (1908)—to reconcile the clash of values established by two constitutional amendments, adopted more than 60 years apart: on the one hand, the "sword" of the Fourteenth Amendment;[18] on the other, the "shield" of the Eleventh.[19] The Eleventh Amendment was designed to insulate state treasuries against federal court awards;[20] the Fourteenth Amendment was designed to place limitations upon states in their treatment of private persons.[21]

The line ultimately drawn in *Edelman* v. *Jordan*, *supra*, evolved from a series of decisions confronting different aspects of the apparent tension between the two amendments. This end product—the line between prospective and retroactive monetary relief—is one which "will not in many instances be that between

[17] As the court below recognized, the Eleventh Amendment has no direct application to this case, because neither cities nor local school boards enjoy Eleventh Amendment protection. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 667, n. 12; *Mt. Healthy School Dist.* v. *Doyle*, 45 LW 4079, 4081 (1977).

[18] *Edelman* v. *Jordan*, *supra*, 415 U.S. at 664.

[19] *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 448 (1976).

[20] *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 n. 1 (1959); *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 187 (1963).

[21] *Fitzpatrick*, *supra*, 427 U.S. at 456.

day and night." *Edelman*, 415 U.S. at 667. This Court did not attempt in *Edelman* to explain the result as a logical distinction which Congress would have drawn starting from first principles, but as the evolved harmonization of conflicting constitutional interests.

To import the line drawn in such fashion into the meaning of § 1983 would make no sense. We are concerned here with the interpretation of a single enactment of Congress. "Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will." *Philbrook* v. *Glodgett*, *supra*, 421 U.S. at 713. While it is theoretically possible that a Congress might choose to draw the line between prospective and retroactive monetary awards impacting upon a municipal treasury, there is not a shred of evidence in the legislative debates to suggest that the Congress of 1871 *in fact* intended to draw such a line in § 1983. Nor is there anything so inherently "right" about the line to attribute it to Congress without any foundation in the language or history of the Act. Is it likely, for example, that Congress intended to empower the federal courts to require massive expenditures from public treasuries to achieve desegregation, while at the same time intending to withhold power from those courts to award back salaries from the same treasuries to the black teachers discriminatorily selected for dismissal and non-renewal as desegregation plans were implemented?[22] It would be a

[22] Cases are common in which the lower federal courts have upheld the propriety in § 1983 cases of backpay awards to black teachers who were discriminatorily selected for dismissal or non-renewal when school integration necessitated force reductions. See, e.g., *Smith* v. *Board of Education of Morrilton School District*, 365

most remarkable coincidence if Congress in 1871 had drawn the precise line which did not begin to be drawn in the Eleventh Amendment cases until 1908 and did not reach final shape until 1974 following decades of litigation.[23]

More important, the importation of the Eleventh Amendment line into § 1983 would contravene the central purpose of that statute—to provide a complete federal remedy for federal constitutional wrongs committed under color of state law—without serving any other purpose which the Congress that enacted § 1983 meant to achieve. The language of § 1983 and its legislative history make clear that the competition of values which led to the distinction between prospective and retroactive relief for purposes of the Eleventh Amendment has no analogous counterpart in § 1983. The latter provision was intended to be broadly remedial and its enactors did not seek to "protect municipal treas-

F.2d 770, 783-784 (8th Cir. 1966) (Blackmun, J.); *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 193 (4th Cir. 1966) (*en banc*); *Hill* v. *Franklin County Board of Education*, 390 F.2d 583 (6th Cir. 1968); *Rolfe* v. *County Board of Education of Lincoln County*, 391 F.2d 77, 81 (6th Cir. 1968); *Hatton* v. *County Board of Education of Maury County*, 422 F.2d 457 (6th Cir. 1970); *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319, 323 (5th Cir. 1970) (Bell, J.) (*Compare*: *Muzquiz* v. *City of San Antonio*, 528 F.2d 499 (5th Cir. 1976) (*en banc*)); *McFerren* v. *County Board of Education of Fayette County*, 455 F.2d 199 (6th Cir.), *cert. denied*, 407 U.S. 934 (1972). See also, *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966) (*en banc*); *Johnson* v. *Branch*, 364 F.2d 1977 (4th Cir. 1966) (*en banc*), *cert. denied*, 385 U.S. 1003 (1967); *North Carolina Teachers Ass'n* v. *Asheboro City Board of Education*, 393 F.2d 736 (4th Cir. 1968) (*en banc*).

[23] The Eleventh Amendment line began to be drawn in *Ex parte Young*, 209 U.S. 123 (1908), and reached its present contours only with the decision of *Edelman* in 1974.

uries." Congress established a sword in § 1983, but no shield.

Analysis of what Congress meant must begin with what was enacted. In its terms, as described above, § 1983 provides to the "party injured" a cause of action for "redress" "in an action at law, suit in equity, or other proper proceeding" against "[e]very person" who violates its substantive provisions. This Court, in the context of interpreting another portion of the Civil Rights Act of 1871, stated that the approach to Reconstruction civil rights statutes is to " 'accord [them] a sweep as broad as [their] language.' " *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971), quoting from *United States* v. *Price*, 383 U.S. 787, 801 (1966). On its face, § 1983—and it is here the meaning of that provision alone which is at issue—provides for complete "redress" against "every person" who violates its terms. That language in itself, cannot constitute the basis for finding a prohibition of retroactive monetary relief against *any* "person."

The legislative history of § 1983 confirms a remedial purpose as broad as its language. We analyze that history in great detail in the appendix which follows this argument. That analysis shows that Congress in passing what is now § 1983 meant to establish a private cause of action for redress as broad as it was empowered to create by the Fourteenth Amendment. Not a word said in connection with the enactment of § 1983 indicates the slightest intention to leave a party injured by a Fourteenth Amendment violation with less than a full remedy. Indeed, the contrary is true: complete remedy for such constitutional violations was Congress' preoccupation. See pp. 5a-13a, *infra*. In this connection, nothing in the debates over § 1983 indicates any

congressional concern to "protect municipal treasuries." If anything, the evidence is strong that Congress meant municipalities to be subject to suit under § 1983 directly as "persons." Congress understood that the Fourteenth Amendment applied to restrict the actions of municipalities, and § 1983 was intended to create a private cause of action as broad as the scope of that Amendment (see pp. 15a-16a, *infra*); and, a month before the introduction of the bill containing § 1983, and less than two months before its passage, Congress had enacted a definitional statute to assist in the construction of subsequently enacted statutes, which provided that except where there was evidence of a contrary congressional intent the term "persons" should be understood to include "bodies politic and corporate." See pp. 1a, 14a-15a, *infra*.

Each of the propositions just set forth regarding the legislative history is fully supported in the appendix. That history, taken together with the unequivocal language of the statute, is sufficient to dispose of any effort to read into § 1983 a distinction between prospective and retroactive remedies in actions against public officials in their official capacities.

It would be sufficient to stop here, but for a complication which results from certain statements made about the legislative debates of 1871 in *Monroe* v. *Pape*, *supra*. *Monroe* decided that the enacting Congress did not mean to include municipalities within the term "persons" in § 1983. That conclusion was based not on the legislative history of those portions of the bill which Congress enacted into law—indeed, as we show in the appendix, *that* legislative history clearly indicates the opposite—but on the history of an amendment to that bill, the Sherman Amendment, which was eventually defeated. 365 U.S. at 187-192. The Sherman

Amendment proposed to make counties, cities, and parishes liable in damages for *private* acts of violence occurring within their boundaries, without regard even to whether those entities had been delegated any police power by the state with which to deal with such violence. See pp. 17a-19a, *infra*. The *Monroe* Court understood the defeat of that amendment to have resulted from Congress' doubt as to its constitutional power to "impose civil liability on municipalities," 363 U.S. at 190. In fact, this understanding is incorrect, as is apparent from two considerations:

First, Congress did not doubt its power to "impose civil liability on municipalities" *in the circumstances governed by § 1983*, i.e. where a municipality in the exercise of powers delegated to it by the state violates the prohibitions of Section 1 of the Fourteenth Amendment. Congress had voted for the Fourteenth Amendment in 1866, and as this Court has repeatedly recognized, it meant the prohibitions of Section 1 to apply to local governmental bodies. *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913); *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938). We demonstrate Congress' awareness of this power in the appendix. See pp. 15a-16a, *infra*. We note here only that the 1871 Congress could not have forgotten what it had done five years earlier, for Representative Bingham (whom Justice Black called "the Madison of the First section of the Fourteenth Amendment"[24]) reminded his colleagues during the debate on § 1983 that in drafting the first section of the Fourteenth Amendment he had used the words "No State shall . . ." for the precise purpose of overruling a Supreme Court decision hold-

[24] *Adamson* v. *California*, 332 U.S. 46, 74 (1947) (dissenting opinion).

ing that a *city's* taking of personal property without compensation did not violate the Constitution as it then stood.[25] He went on to explain that he had copied these words from the Impairment of Obligations of Contracts Clause.[26] And in 1867, only four years prior to the debate on § 1983, the Supreme Court had ruled that the latter clause bound municipalities equally with states, and affirmed a writ of mandamus compelling municipal officers to levy taxes if necessary to honor the contract sought to be impaired. *Von Hoffman* v. *City of Quincy*, 71 U.S. 535, 554-555 (1867).

Second, an examination of the debates over the Sherman Amendment reveals that while the Amendment failed owing to a doubt concerning Congress' power, it was a doubt germane to the Sherman Amendment's unique provisions and wholly irrelevant to the meaning of § 1983. See pp. 17a-31a, *infra*. The Sherman Amendment had nothing to do with requiring municipalities to abide by the requirements of the Fourteenth Amendment in exercising powers delegated by the states; rather, it would have made municipalities affirmatively responsible for preventing certain *private* acts of violence from occurring within their boundaries. Congress' doubt went only to its constitutional power to impose on local government bodies the affirmative obligation to exercise the police power; it was this doubt which led to the defeat of the Sherman Amendment. The Republican representatives who supported the bill generally, but whose defection caused the defeat of the Sherman Amendment, asserted that

[25] Cong. Globe, 42 Cong., 1st Session, Appendix (hereinafter "Globe App."), p. 83-84.

[26] Globe App. 84.

it was the prerogative of the states to determine whether and how to delegate the police power function to local governments; that Congress could not bypass the states and impose such functions directly upon those governments; and consequently that Congress lacked power to hold municipalities monetarily liable for failing to exercise such power. See pp. 21a-31a, *infra*. That constitutional doubt, of course, warrants no inference that Congress intended to insulate municipal treasuries in § 1983, for, unlike the Sherman Amendment, § 1983 did not purport to impose any affirmative obligations upon municipalities, but only to enforce the prohibitions of the Fourteenth Amendment—"no State shall . . ."—which Congress knew applied to municipalities in their exercise of whatever powers the states chose to delegate to them. We analyze the meaning of the defeat of the Sherman Amendment more fully in the appendix.

We do not challenge here the holding of *Monroe* v. *Pape*. Soundly based or not, the decision there that municipalities are not "persons" under § 1983, twice relied upon in recent decisions,[27] may well be entitled to *stare decisis* effect. But neither *stare decisis* nor any other doctrine compels this Court to perpetuate *Monroe's* erroneous reading of the legislative history when, as here, distinct issues of statutory construction, not controlled by the actual holding of *Monroe*, are presented for decision. Congress did *not* intend to "protect municipal treasuries," and there is thus no warrant for limiting the remedies available in a § 1983 action against public officials in their official capacities.

[27] *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). See also *Aldinger* v. *Howard*, 427 U.S. 1, 16 (1976).

II. SCHOOL BOARDS ARE "PERSONS" WITHIN THE MEANING OF § 1983.

The court below decided that the Board of Education of the City of New York is not a "person" within the meaning of § 1983. The opinion is ambiguous as to the ground upon which this decision is based. On the one hand, the opinion indicates that due to institutional characteristics peculiar to this board of education, it should be considered a part of the City of New York, and not an independent entity; therefore, the board is not a "person" because the city is not a "person." Pet. A. 44-50. If this be the court's holding, it is not of particular interest to these *amici*, whose concern is with the "person" status of those school boards which are independent entities. We do note on this issue, however, that contrary to the apparent conclusion of the court below, the New York courts have consistently ruled that the New York City Board of Education is "an independent corporation separate and distinct from the city." *Lanza* v. *Wagner*, 11 N.Y.2d 317, 326 (1962); *People ex rel. Wells & Newton Co.* v. *Craig*, 232 N.Y. 125, 135 (1922).

On the other hand, implicit in a portion of the court's analysis is a finding that no school boards, regardless how constituted, are "persons" within the meaning of § 1983. If this be the court's holding, we believe it to be in error. In their typical form, local school boards are distinct and independent governmental entities not properly viewed as mere sub-parts of other governmental bodies. See *Milliken* v. *Bradley*, 418 U.S. 717, 741-743 (1974). As consistently as this Court has treated other governmental entities as outside the ambit of § 1983 and § 1343(3), so equally consistently (and in far greater volume) has this

Court treated school boards as *within* the ambit of those provisions. In case after case, particularly in the school desegregation area, this Court has entertained § 1983 actions in which school boards were defendants, without any indication that such boards were not proper parties.[28]

Beyond merely entertaining these cases, the Court has on a number of occasions issued orders against school boards or directed or approved the issuance of such orders. For example, in *Green, supra*, 391 U.S. at 437-439, 441-442, a unanimous Court declared:

> "13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of Respondent School Board's 'freedom of choice' plan to achieve that end. The School Board contends that it has fully discharged its

[28] See, e.g., *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *McNeese* v. *Board of Education*, 373 U.S. 663 (1963); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963); *Griffin* v. *School Board*, 377 U.S. 218 (1963); *Bradley* v. *School Board*, 382 U.S. 103 (1965); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Raney* v. *Board of Education*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); *Kramer* v. *Union School District*, 395 U.S. 621 (1969); *Alexander* v. *Board of Education*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana School Bd.*, 396 U.S. 226 (1969), 396 U.S. 290 (1970); *Swann* v. *Board of Education*, 402 U.S. 1 (1971); *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33 (1971); *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973); *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974); *Goss* v. *Lopez*, 419 U.S. 565, 568 (1975); *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976); *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 424 (1976). Several of these decisions encompassed two or more consolidated cases. In addition to these full decisions, there of course has been an enormous number of *per curiam* decisions in school desegregation cases against school boards.

> obligation . . . But that argument ignores the thrust of *Brown II* . . . School boards such as the respondent . . . were . . . charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system . . . [I]t was to this end that *Brown II* commanded school boards to bend their efforts.
>
> ". . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.
>
> * * *
>
> "The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system . . . [T]he plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." (emphasis in original; footnote omitted).

To like effect, see, e.g., *Carter, supra*, 396 U.S. at 228; *Keyes, supra*, 413 U.S. at 213-214; *Monroe, supra*, 391 U.S. at 458-459; *Alexander, supra*, 396 U.S. at 20; *Davis, supra*, 402 U.S. at 35. See also *Bradley, supra*, 416 U.S. at 699, 718.

Congress has followed these decisions closely and has assumed from these decisions, and acted upon the assumption, that school boards are subject to suit by

private parties. In 1964, 1972, and 1974, Congress enacted into law statutes founded on that assumption.

In 1964, Congress augmented what it took to be an existing right of private parties to bring discrimination actions against school boards by providing that, under certain circumstances, the Attorney General may bring such actions where he can certify that the aggrieved private parties are as a practical matter unable to bring their own suit. 42 U.S.C. § 2000c-6. Congress was careful to make clear that it did not intend to "affect adversely the right of any person to sue or obtain relief in any court against discrimination in public education." 42 U.S.C. § 2000c-8.

In 1972, Congress passed extensive legislation in response to the school desegregation decisions of this Court and the lower federal courts, again building on the assumption that school boards are proper defendants in private actions to enforce constitutional rights. The 1972 Congress passed, *inter alia:* (a) a provision allowing attorney's fees to the prevailing party, "other than the United States," "[u]pon entry of a final order by a court of the United States against a local educational agency, . . . " for violation of the Fourteenth Amendment, 20 U.S.C. § 1617; and (b) a provision authorizing federal financial assistance to "local school agenc[ies]" which are implementing a desegregation plan "undertaken pursuant to a final order issued by a court of the United States, . . . ," 20 U.S.C. § 1605 (see also 20 U.S.C. § 1601). Once again, Congress recognized the "existing power" of federal courts "to insure compliance with constitutional standards" in school desegregation actions, 20 U.S.C. § 1656, and sought only to prohibit "enlargement" of that power, *id.*

In 1974, Congress found, *inter alia,* that as a result of court busing orders in suits brought to enforce the Fifth and Fourteenth Amendments, "local educational agencies" had been required to "expend large amounts of funds, thereby depleting their financial resources. . . ." 20 U.S.C. § 1702(a)(3). That finding did not motivate Congress to withdraw federal jurisdiction over suits against "local educational agencies." Rather, Congress in 1974 sought to set remedial priorities in such suits, so that busing would be a remedy of last resort. See particularly, 20 U.S.C. § 1713. Far from removing jurisdiction, Congress made clear that "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b).

From time to time bills have been introduced in Congress designed to withdraw or limit federal court jurisdiction to entertain suits against school boards.[29] No such bill has been enacted. Other bills have been introduced which proposed to limit the remedies available in school desegregation suits, drafted in a fashion

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[29] In the first session of the 93rd Cong., for example, the following bills were introduced in the Senate: S. 179 (Jan. 4, 1973), a bill introduced by Senator Griffin to deprive federal courts of jurisdiction to issue busing orders; S. 287 (Jan. 11, 1973), a bill introduced by Senator Scott to withdraw all lower federal court jurisdiction over cases "involving the public schools"; S. 1737 (May 8, 1973), a bill introduced by Senators Ervin and Allen which, in Sec. 1207, would withdraw federal court jurisdiction, *inter alia,* to "issue any order requiring any school board" to abandon a freedom-of-choice plan, or "requiring any school board" to bus, or "requiring any school board" to close any school.

which clearly reflects the sponsors' belief that school boards are presently proper defendants in such suits.[30]

For over twenty years, and in more than that many cases, this Court has treated school boards as "persons" subject to suit pursuant to § 1983 and § 1343(3). Congress has understood this Court so to have ruled, and has after careful consideration accepted, indeed built upon, that understanding. In the light of this history, the question whether school boards are "persons" under § 1983 must be regarded as settled in the affirmative. See *Brown Shoe Co.* v. *United States, supra,* 370 U.S., at 306-307; *Flood* v. *Kuhn, supra,* 407 U.S., at 282-284.

[30] See, e.g., S. 619, 93d Cong., 1st Sess. (Jan. 31, 1973), a bill sponsored by Senators Allen, Baker, Buckley, Helms, Nunn, Scott, Sparkman, Stennis, Talmadge, and Thurmond, which provided in Sec. 207:

> "Sec. 207. Any court order requiring the desegregation of a school system shall be terminated, if the court finds the schools of *the defendant educational agency* are a unitary school system, one within which no person is to be effectively excluded from any school because of race, color, or national origin, and this shall be so, whether or not such school system was in the past segregated de jure or de facto. *No additional order shall be entered against such agency* for such purpose unless the schools of such agency are no longer a unitary school system." (emphasis added).

CONCLUSION

For the reasons set forth hereinabove, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX *

An Analysis of the Legislative History of the Civil Rights Act of 1871 as It Relates to the Issues Presented in This Case

I.

We begin by briefly describing the course of the legislation which emerged as the Civil Rights Act of 1871, noting the particular features which bear directly upon the issues in this case. We then discuss the pertinent legislative history in depth.

The legislative history properly begins on February 25, 1871, one month before the civil rights bill was introduced. On that day, the "dictionary act" was enacted, providing, in pertinent part:

> "That in *all* Acts hereafter passed . . . *the word 'person' may extend and be applied to bodies politic and corporate*, and the reference to any officer shall include any person authorized by law to perform the duties of such office, *unless the context shows that such words were intended to be used in a more limited sense* . . . ."[1]

On March 28, 1871, the House Select Committee reported H.R. 320, a bill "to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes," which, with such modifications as were made in the ensuing debates, emerged as the Civil Rights Act of 1871.[2]

The bill contained four sections. Section 1—now codified in 42 U.S.C. § 1983—was enacted by Congress in

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* Throughout this Appendix, "Globe" is used to refer to the Congressional Globe, 42d Cong., 1st Sess., and "Globe App." is used to refer to the Appendix thereto.

[1] Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (emphasis added).

[2] Globe 317.

the form originally reported, without a single word change. It provided:

> "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the 9th of April, 1866, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,' and the other remedial laws of the United States which are in their nature applicable in such cases."[3]

Section 2 of the bill, as introduced, defined certain federal crimes and prescribed their punishment. Sections 3 and 4 proposed to empower the President to send the militia into the states and communities, and to suspend the writ of *habeas corpus*, in prescribed circumstances.[4]

The bill was debated first in the House. There were no amendments to Section 1. The sponsors uniformly declared that their purpose in enacting Section 1 was to provide as complete a civil cause of action for relief as the Fourteenth Amendment authorized Congress to create.[5] No "Sherman

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[3] Globe App. 138. See also 17 Stat. 13.

[4] Globe App. 138.

[5] See *infra*, pp. 5a-13a.

Amendment," or its equivalent, was proposed in the House. Sections 2, 3 and 4 were amended on the floor of the House to assuage the concerns of several Republicans that the bill as originally drafted might invade the States' reserved police powers.[6] The House bill, when passed, was referred to the Senate.

The Senate adopted Section 1 without change, its sponsors declaring the same broad purpose as had their House colleagues.[7] Just prior to the vote on the bill, Senator Sherman introduced his amendment on the floor of the Senate, the text of which appears *infra*, n.47, to make "the inhabitants" of the county, city or parish liable for injuries caused by private acts of violence within the municipality's borders. Pursuant to a rule of procedure which had been adopted, there was no debate on Sherman's amendment. The amendment was adopted by the Senate, and the entire bill, including the Sherman Amendment, was returned to the House.

The House refused to accede to the amendments which the Senate had made in the bill. The debate was brief. The Sherman Amendment was declared to be "obnoxious," and deserving of a quick burial, and with that the House voted to go to conference with the Senate.[8]

The conferees agreed upon a revised version of the Sherman Amendment, making the municipality, rather than its inhabitants, liable fo. private acts of violence within its borders, and reported back to their respective houses.[9]

The Senate took up the conference committee report first. This time, there was no rule precluding debate, and

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[6] See *infra*, pp. 21a-23a.

[7] See *infra*, pp. 7a, 11a-14a.

[8] See *infra*, p. 18a.

[9] See *infra*, pp. 18a-19a.

the substance of the Sherman Amendment was debated on the floor of the Senate. Its sponsors explained that their purpose was to impose upon municipalities the duty to police their communities, and to make them liable monetarily where they refused or failed to do so.[10] The Senate voted to adopt the conference report (and thus to adopt the revised Sherman Amendment) by a vote of 32 to 16. The vote on the conference report, like the original vote, was along party lines, the Republicans supporting the bill and the Democrats opposing it.[11]

The conference report fared less well in the House. The difference was that a number of Republicans defected from the "party line" on the Sherman Amendment. They doubted that Congress had the constitutional power to impose policing obligations upon municipalities; they believed that the States' reserved powers included the right to determine whether and to what extent to delegate police powers to municipalities; and they thought it improper for Congress to impose monetary liability for a municipality's failure to carry out a duty which Congress had no right to impose upon it. The Republicans opposing the Sherman Amendment were the very ones who had earlier raised similar "police power" objections to Sections 2, 3 and 4 as originally drafted. Within minutes after they spoke, the House voted to reject the conference report. Twenty-three House members who supported the rest of the civil rights bill voted against the Sherman Amendment, and their votes were decisive in causing its rejection.[12]

As a result of the House's rejection of the conference report, a second conference was necessary. In this conference, the Sherman Amendment was abandoned, and in

[10] See *infra*, pp. 19a-20a.

[11] See *infra*, p. 20a.

[12] See *infra*, pp. 29a-30a.

its place the provision now codified as 42 U.S.C. § 1986 was adopted. This second conference report was approved after brief debate by both Houses, and the bill as thus enacted was signed by President Grant.

As we show herein:

1. The legislative history of Section 1 shows that Congress intended by that section to exercise all of the power which it possessed under the Fourteenth Amendment to create civil actions for complete relief, and it did not intend to insulate municipal treasuries from liability in suits brought pursuant to Section 1; and

2. The Sherman Amendment was defeated for reasons which are wholly irrelevant to and furnish no evidence of Congress' intentions with respect to Section 1.

Accordingly, the legslative history refutes the contention that Congress intended to insulate municipal treasuries from liability in Section 1 suits.[13]

II.

Debate on the civil rights bill in the House was opened by Representative Shellabarger, Chairman of the House Select Committee, who had authored the bill[14] and was its manager in the House. He stated:

> "This Act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the

[13] See *infra*, pp. 31a-32a.

[14] Representative Kerr, an opponent, was surprised that Shellabarger "could at all conceive and pen such provisions as are contained in this measure." Globe App. 46.

> United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. These provisions of the Fourteenth Amendment are wholly devoted to securing the equality and safety of all the people, as is this Section [Section 1], and, indeed, the entire bill." [15]

Shellabarger went on to quote from Story on Constitution as follows:

> "Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws." [16]

Anticipating objections that the bill invaded state sovereignty, Shellabarger declared:

> "[W]here is the doubt Congress may, by appropriate legislation, protect those rights of American citizenship so solicitously and so abundantly guarded and made eternal as the Constitution itself? If, after all this transcendent profusion of enactment in restraint of the States and affirmative conferment of power on Congress, the States still remained unrestrained, . . . to make laws, abridging or not abridging, to protect or to destroy, by banded murder, these United States citizens as the State may please, and the United States must stand by a powerless spectator of the overthrow of the rights and liberties of its own citizens, then not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of

[15] Globe App. 68. See also Globe 317.

[16] Globe App. 68.

> words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be." [17]

Shellabarger then "repeated" his premise, "that it is the duty of Congress to enforce by appropriate legislation every provision of the Constitution where legislation is needed to secure the enforcement." [18]

In the Senate, Senator Edmunds, the manager of the bill, declared:

> "The first section is one . . . defining the rights secured by the Constitution of the United States when they are assailed by any state law or under color of any state law, and it is merely carrying out the principles of the civil rights bill [of 1866, 42 U.S.C. §§ 1981, 1982], which have since become a part of the Constitution." [19]

Senator Edmunds added that Section 1 was "so very simple, and really reenacting the Constitution." [20]

In both houses, the statements of other supporters corroborated the views of the bill's managers: that Section 1 was an exercise of the entirety of Congress' power to create a civil cause of action for complete relief for violations of the rights established by the Fourteenth Amendment.

Representative Bingham, who had authored Section 1 of the Fourteenth Amendment, which was the constitutional predicate for Section 1 of the bill, declared the bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic in every

[17] Globe App. 69.

[18] Globe App. 70.

[19] Globe 568.

[20] Globe 569.

State and Territory of the Union *to the extent of the rights guaranteed to him by the Constitution.*" [21]

Representative Garfield, declaring that the Equal Protection Clause of the Fourteenth Amendment "is a broad and comprehensive limitation on the power of the State governments, and, without doubt, Congress is empowered to enforce this limitation by any appropriate legislation," [22] stated:

> "But the chief complaint is . . . [that] by a systematic maladministration of [state laws], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section [of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." [23]

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[21] Globe App. 81 (emphasis added). See also *id.* at 84. Representative Bingham elaborated further (*id.* at 85):

> "The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?"

[22] Globe App. 153.

[23] *Id.*

Representative Sheldon, urging that "it is the highest duty of the government to provide means to protect and secure every citizen in undisturbed enjoyment" of his constitutional rights, concluded:

> "It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States and I believe that it can extend its powers, through its courts, in times of peace, directly to the individual citizen who is deprived of his rights, privileges, and immunities, whether through the positive act or the default of the State authorities." [24]

He saw it is as "proper, to make a permanent law affording to every citizen a remedy in the United States courts for injuries to him in those rights declared and guaranteed by the Constitution." [25]

Representative Dawes explained that the bill goes as far as the Constitution goes, for its purpose was to provide a remedy whenever constitutional rights were violated:

> "The rights, privileges, and immunities of the American citizen secured to him under the Constitution of the United States are the subject matter of this bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law. The purpose of this bill is, if possible, and if necessary, to render the American citizen more safe in the enjoyment of those rights, privileges, and immunities. No subject for legislation was ever brought before the American Congress so broad and comprehensive, embracing as it does all other considerations hitherto af-

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[24] Globe 367-368.

[25] Globe 368.

fecting the life, liberty and pursuit of happiness of every citizen of this Republic."[26]

Representative Dawes asked, "can there be any doubt that there exists whatever power is necessary to secure these rights?"[27] He answered that the Constitution carries with it:

> "the power by legislation, or by any other proper means, of securing and carrying out to their full extent the free, undisturbed enjoyment of each and every one of the rights, privileges and immunities whatever they may be and however broad they may be, which the Constitution itself secures, or professes at least to secure, to the American citizen."[28]

Representative Dawes concluded by asserting that:

> "Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and . . . this may be done—
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> *First*. By giving him a civil remedy in the United States courts for any damage sustained in that regard."[29]

Other members of the House similarly evidenced their understanding that the bill was to exercise the full congressional power vested in Congress by the Fourteenth Amendment to provide a remedy assuring the full enforcement of that amendment's prohibitions. See, e.g., Globe App. 166 (Rep. Williams); Globe App. 182 (Rep. Mercur); Globe 428, 429 (Rep. Beatty); Globe 448 (Rep. Butler);

[26] Globe 475.

[27] *Id.* at 476.

[28] *Id.*

[29] *Id.* at 477.

Globe 481, 482, 483 (Rep. Wilson); Globe 511-512 (Rep. Perce); Globe App. 202 (Rep. Snyder); Globe 376 (Rep. Lowe); Globe App. 188 (Rep. Willard).

The Senate debates were similar. Senator Trumbull declared that the Fourteenth Amendment empowers the federal government both to "correct" violations of its provisions, and to "prevent any state from depriving any person" of the rights created thereunder.[30] In a dialogue, Senator Edmunds asked Senator Trumbull if he agreed that the Fourteenth Amendment made "a wise advance in favor of the protection of private rights by affirmative legislation by Congress where those private rights are guarantied by the Constitution, and that in connection with it Congress is authorized by the same Constitution to carry them into effect by affirmative law."[31] Senator Trumbull agreed, and noted that "we provide in the bill before us for a redress through the judiciary."[32] Senator Trumbull further stated that:

> "[I]n regard to all the rights secured by the Fourteenth Amendment, however extended, in time of peace, the courts are established to vindicate them, and they can be vindicated in no other way. Sir, the judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free Government."[33]

He added:

> "Whenever the rights that are conferred by the Constitution of the United States on the Federal Government are infringed upon by the States, we should afford a remedy. . . . I am ready to pass appropriate

[30] Globe 577.

[31] *Id.* at 578.

[32] *Id.*

[33] *Id.*

> legislation on that subject; and I understand that this bill as it passed the House of Representatives was framed on this principle."[34]

Senator Pool, noting that under the Fourteenth Amendment "the State is prohibited from denying in any manner . . . within its jurisdiction the equal protection of the laws," declared that should states violate that prohibition "then the United States . . . must and will, by appropriate legislation, by all the power of its courts . . . extend over him within the States the shield of the national authority."[35]

Senator Thurman was the leader of the opposition in the Senate, and he presented the most extensive criticism of § 1 contained in the entire debates. He launched his attack with these words:

> "This section relates wholly to civil suits. It creates no new cause of action. Its whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, an[d] that without any limit whatsoever as to the amount in controversy . . . . I am certainly not in favor of denying to any man who is deprived unlawfully of his right, his privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated; but I do think that it is a most impolitic provision, that in effect may transfer the hearing of all such cases into the Federal courts."[36]

[34] Globe 578-579.

[35] Globe 609.

[36] Globe App. 216.

And he concluded with this complaint:

> "[T]here is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used."[37]

Senator Boreman, a supporter, defined the congressional purpose to be to avoid "the merest mockery" of "say[ing] that the citizens of any portion of this country, or the people residing in any portion of this country, had guarantied to them by our Constitution certain rights, and at the same time to say that there was no power in this Government to secure to them those rights, to carry out the guarantee, to enable them to enforce those rights."[38] The goal, in Senator Boreman's view, was "to provide the machinery in order that the injured person may secure his rights."[39] It was Congress' duty, he said, "to protect the humblest citizen, the humblest person that will be found in any part of this Union, in all his rights, privileges, and immunities, whatever they may be under the Constitution . . . ."[40]

Other Senate supporters expressed similar views. See, e.g., Globe 650 (Sen. Sumner); Globe 653 (Sen. Osborn). Throughout the debates, therefore, complete justice was the central, recurring refrain: wherever and however Fourteenth Amendment rights are impaired, the injured party ought to—must—receive full redress. That was the plain intent underlying Section 1, as well as the other sections.

III.

With these declarations of purpose, both houses passed bills containing Section 1 in the exact language which was

[37] Globe App. 217.

[38] Globe App. 229.

[39] *Id.*

[40] *Id.*

finally adopted. Although the legislative history does not end at this point, for the Senate had amended other sections of the House bill (including the addition, without debate, of the Sherman Amendment as Section 7), there was not any further debate on Section 1. It is appropriate, therefore, to pause and examine what the two houses appear to have intended—at least at this point—respecting the application of Section 1 to municipalities. There are two pertinent guides to determining that intent:

1. On February 25, 1871, less than a month prior to the introduction of Section 1 in the exact language ultimately enacted, Congress adopted a statute (colloquially known as the "dictionary act"),[41] whose declared purpose was "to prevent doubt and embarrassment in [the] construction" of statutes.[42] Section 2 of that Act provided:

> "That in *all* Acts hereafter passed . . . *the word 'person' may extend and be applied to bodies politic and corporate*, and the reference to any officer shall include any person authorized by law to perform the duties of such office, *unless the context shows that such words were intended to be used in a more limited sense*. . . ."[43]

The natural reading of this statute is that, except as "the context shows that such words were intended to be used in a more limited sense," Congress intended the term "person" in subsequently enacted statutes to include "bodies politic and corporate." There is no indication in the debates on Section 1 of the Civil Rights Act that Congress

[41] The Act has been described as an instance where "Congress supplies its own dictionary." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 536.

[42] Cong. Globe, 41st Cong., 3d Sess. 1474 (Feb. 21, 1871) (remarks of Rep. Poland, one of the House managers of the bill, reporting on the agreement of the Conference Committee).

[43] Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

intended the "unless" clause to be applicable, nor does the "context show" that such was intended.[44]

2. The sponsors uniformly stated that Section 1 was to extend as far as the Fourteenth Amendment authorized it to go, and nowhere indicated an intention to rein in its sweep short of the municipal treasury. They knew that the prohibitions of the Fourteenth Amendment ("No state shall . . .") applied to municipalities,[45] and they knew

[44] In *Monroe*, the Court deemed the "dictionary act" unpersuasive on the question whether municipalities are "persons," because the "definition is merely an allowable, not a mandatory one." 365 U.S. at 191. Respectfully, we suggest that the Court's construction was not correct. The stated purpose of the "dictionary act" was to "prevent doubt" in the "construction" of statutes. Cong. Globe, 41st Cong., 3d Sess. 1474. If the definitions therein were merely "allowable"—i.e. if the act meant simply that the term "person" "may or may not" include bodies politic or corporate— the act would have created doubt rather than resolved it. Moreover, if that were the construction Congress intended there would have been no reason to include the "in all Acts" and "unless" clauses in the statute. (Significantly, the Court in *Monroe* appears to have overlooked those clauses; the opinion states merely that the statute "provides that the word 'person' 'may extend and be applied to bodies politic and corporate.'" 365 U.S. at 190.) It seems far more logical, given the act's purpose, that it intended that the term "persons" in subsequently enacted statutes *was* to include bodies politic or corporate, except where the act's "unless" clause came into play, i.e., "unless the context shows that such words were intended to be used in a more limited sense." Of course, given the *Monroe* Court's misunderstanding of the debate on the Sherman Amendment (see 30a-32a, *infra*), its ultimate conclusion would not have been altered, for on that understanding the "unless" clause would have been applicable.

[45] Congress had voted for the Fourteenth Amendment only five years before, in 1866, and as this Court has repeatedly recognized, Congress meant the prohibitions of Section 1 thereof to apply to municipalities. *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *Home Telephone and Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913); *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938). Lest any Congressman had forgotten this by 1871, Representative Bingham, who had authored Section 1 of the Fourteenth Amendment, reminded his colleagues during the 1871 debate that he had used the "No state

that municipalities did not enjoy the protection of the Eleventh Amendment.[46] If they had intended to "protect

shall" formulation for the precise purpose of overruling the Supreme Court's decision in *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243 (1833), a case in which, he explained, "the *city* had taken private property for public use, without compensation as alleged, and there was no redress for the wrong in the Supreme Court of the United States." Globe App. 84 (emphasis added). Bingham explained further that he had copied the words "No state shall . . ." from Article I, Section 10 of the Constitution, the Impairment of Obligations of Contracts Clause. *Id.* In 1867, four years prior to the 1871 debate, this Court had ruled that the latter clause bound municipalities equally with the states, and affirmed a writ of mandamus compelling municipal officers to levy taxes if necessary to honor the contract sought to be impaired. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 554-555 (1867). The equation in the impact of the two clauses upon municipalities is discussed at length in *Home Telegraph*, *supra*, 227 U.S. at 295-296.

[46] During the 1860's this Court issued innumerable decisions enforcing judgments against municipalities for defaulting on their bond obligations. See, e.g., *Knox Co.* v. *Aspinwall*, 24 How. 376 (1861); *Gelpcke* v. *Dubuque*, 1 Wall. 175 (1864); *Riggs* v. *Johnson Co.*, 6 Wall. 166 (1868); *Von Hoffman*, *supra*; *Butz* v. *Muscatine*, 8 Wall. 575 (1869). These decisions were a subject of great national notoriety after the Civil War, for municipal officials in some states defied federal court orders and risked imprisonment. Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, Part I* (MacMillan 1971), pages 920-1095, and the 1871 Congress was aware of them. See, e.g., Globe App. 314-15 (Rep. Burchard); Globe 751-52 (Rep. Shellabarger); Globe 777 (Sen. Sherman). These cases could not have been brought in federal court had municipalities been protected by the Eleventh Amendment, for the immediate purpose of that Amendment had been to overrule *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), which had upheld federal court jurisdiction over bondholder actions against states. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 660-662. It was not until 1890 that a municipality even *asserted* the Eleventh Amendment as a defense, and the Court, rejecting the defense out of hand, observed that "the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the federal courts in such suits has become established." *County of Lincoln* v. *Luning*, 133 U.S. 529, 530 (1890).

municipal treasuries," as the court below assumed, would they not have said so?

IV.

The lone question remaining is whether the subsequent congressional consideration of the *other* provisions of the bill, and particularly of the Sherman Amendment, alters the understanding of what Congress intended in Section 1.

The Senate bill, as noted, had added the Sherman Amendment, as Section 7, without debate. The Amendment dealt with one subject only: it made "the inhabitants of the county, city or parish" liable "to pay full compensation" to any person injured by certain acts of private violence within the municipality's borders. It was to be enforceable by suit "against said county, city or parish," and if judgment were obtained the plaintiff was authorized to execute the judgment by levy "upon any property, real or personal, of any person in said county, city, or parish."[47]

[47] The full text of the Sherman Amendment as passed by the Senate was as follows (Globe 663):

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a

The House refused to concur in the Senate's amendments to the bill, which included creation of a jury oath as well as addition of the Sherman Amendment.[48] The only references to the latter were a declaration by one member that it was "most obnoxious"[49] and by another that it "should be passed with the silence of death and the grave."[50]

The Conference Committee recommended a revised Sherman Amendment, which removed the liability of the inhabitants of counties, cities and parishes and substituted direct liability of these municipalities.[51]

judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction."

[48] Globe 725.

[49] Globe 723.

[50] Globe 724.

[51] The full text of the revised Sherman Amendment, as recomended by the Conference Committee, was as follows (Globe 749):

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part,, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was

The Senate took up consideration of the report, and as the Amendment had not been debated originally this was the first occasion for its proponents to explain its purpose. Senator Edmunds explained that it was designed, in part, to impose "some little obligation upon the part of the communities in which these tumults should occur, to see that justice was done and properly protected."[52] He reasoned that,

> "given the . . . duty of the authorities of the localities to protect people in the way and to the extent that the Constitution says they shall protect them, that it must follow that he who refuses that protection or denies it, be he a principality, or a city, or a nation, if you please, is bound, if there is any value in the law at all, to make good the injury which the citizen who is committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment."

[52] Globe 756. See generally *City of Chicago* v. *Sturges*, 222 U.S. 313 (1911) (rejecting city's Fourteenth Amendment challenge to state statute similar to Sherman Amendment).

titled to that protection suffers; in other words, to bear the consequences of his own default."[53]

In a colloquy with Senator Conkling, Senator Edmunds agreed that the bill was "saying" to municipalities:

> "You, a parish, are bound to preserve the peace and enforce the provisions of the Constitution of the United States, and when you fail so to do, we deal with you directly."[54]

Senator Sherman confirmed that this was the Amendment's purpose, and declared that Congress had as great a power as a State to impose this policing duty upon municipalities:

> "If a State may, to secure the peace and quiet and good order of its citizens, pass a law making a county or a portion of the people responsible for a riot in order to deter such crime, then we may pass the same remedies and use the same means to enforce and secure to our citizens the rights conferred in the Constitution of the United States."[55]

This conception of congressional power—that Congress could charge municipalties with the affirmative obligation to protect federal rights against private interference, and punish the municipalities' failures to carry out that obligation—did not offend the Senate. The conference report was approved by a 2-1 margin in the Senate, on a straight "party line" vote. With one exception, the opposing votes were cast by Senators who voted against the final bill even after the Sherman Amendment was removed.[56]

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[53] Globe 757.

[54] *Id.*

[55] Globe 760. See also Globe 761.

[56] Of the 16 senators who voted against the Sherman Amendment (Globe 779), only one (Fenton) voted for the final bill following removal of the Sherman Amendment (Globe 831).

A different fate awaited the conferees' redraft of the Sherman Amendment in the House. The difference was that a number of Republicans in the House, who supported the bill generally, did not believe that Congress had constitutional authority to hold municipalities accountable for refusing to exercise police powers. In their view, the Constitution left the police power with the states, and it was thus for the states to decide whether, and to what extent, that power should be delegated to subordinate agencies. In fact, they said, many municipalities did *not* have police powers, and those which did held them at the will of the state. For Congress to make municipalities accountable for failing to police private misconduct thus constituted an impermissible interference with the internal affairs of the states in an area which the Constitution left entirely with the states.[57]

Objections reflecting the same constitutional concern had been raised by the same Republican Representatives, in a different context, when the bill was first before the House. Sections 2, 3 and 4 of Representative Shellabarger's original bill had contained language which these members thought trespassed on the states' reserved police power, and they had successfully battled for amendments to those sections to remove the objectionable matter.

Representative Garfield had presented a learned argument respecting the improper encroachment which he believed these sections made upon States' police powers,[58] and he declared that:

> "Amendments have been prepared which will remove the difficulties to which I have alluded; and I trust that my colleague [Mr. Shellabarger] and his Committee will themselves accept and offer these amendments."[59]

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[57] We document these matters *infra*, pp. 23a-31a.

[58] Globe App. 149-155.

[59] *Id.* at 153.

They did; Sections 2, 3 and 4 were amended by Representative Shellabarger.[60] With these changes, those Republicans who had been troubled were satisfied and returned to support of the bill. Representative Poland explained what the changes accomplished:

> "I was opposed to the bill which was brought in by the committee, because I thought it gave the power to the General Government, to Congress, to go down into the States and legislate for the punishment of ordinary offenses against person and property. I did not believe, I do not now believe, that the Constitution, as amended, gives us any such power. The Constitution originally left to the State the administration of the local law, both civil and criminal; all offenses against person and property were to be punished by the State authorities.
>
> I do not agree that the fourteenth amendment or any amendment has changed that, except to this extent: the last clause of the fourteenth amendment provides that no State shall deny the equal protection of the laws to its citizens. Now, in my judgment, that is a constitutional enactment that each State shall afford to its citizens the equal protection of the laws. I cannot agree with several gentlemen upon my side of the House who insist that if the State authorities fail to punish crime committed in the State therefore the United States may step in and by a law of Congress provide for punishing that offense; I do not agree with those gentlemen.
>
> But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out

[60] Globe 477-478.

> this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States."[61]

The concern that the reserved police power of the State not be invaded had been shared by Representatives Willard,[62] Farnsworth,[63] and Burchard.[64] See also Blair.[65]

It was these Republicans who had objected to the encroachment of the original sections 2, 3 and 4 upon State police powers who raised the same objections when the Conference Committee reported the Sherman Amendment. That Amendment, in a different way, equally invaded the States' police power, for, as its sponsors had boasted, it was intended to bypass the States, impose policing duties directly upon municipalities, and hold those municipalities monetarily accountable should they fail to assume those duties.

The first Republican to speak against the Sherman Amendment was Rep. Willard. His objection was that

[61] Globe 514.

[62] Globe App. 187.

[63] Globe 513.

[64] Globe App. 313-315.

[65] Globe App. 73.

Congress, lacking the power to invest municipalities with police powers, should not (perhaps could not) impose liabilities upon municipalities for not exercising police powers. He explained that many municipalities had not been granted police powers by the States, and that those which had might lose them at any time if the State so chose. In his view, it would be wrong for Congress to impose monetary liability upon municipalities for failing to exercise powers which they did not possess, or which they possessed wholly by leave of the States. His analysis stated succinctly the constitutional concern shared by his Republican colleagues:

> "[T]he State, within its boundaries, has the creation and the control of the laws for the protection of the people. What can the county do? What can the parish do? What can a city do, to give me the equal protection of the laws? The city and the county have no power except the power that is given them by the State. They cannot keep violence away from me; they cannot protect me in my rights, except as the State has clothed them with the power to do so; and for the enforcement of the laws of the State they get no aid, no authority, no power whatever from the United States.
>
> "In most of the States—it is so in mine, I know—the counties and the towns have no power whatever in this regard except as those powers have been conferred upon them by the State; and these powers can be taken from them at any time by the State. If these powers are not given to them by the State, if they hold them only at the will of the State, what justice is there in making the town, city, or parish liable for not protecting the property of citizens, when perhaps no laws for its protection exists; for not giving me protection, when they have not been clothed by the State with the right and power to give me protection?

> "Thus it seems to me—and, as I said before, I am only arguing this point in the light of its justice, and not as a strict question of constitutional law—that we are imposing upon a community an obligation that we have no right to impose upon them, that in justice we cannot impose upon them for the reason that such municipalities are, as such, powerless to either make or enforce the laws of the State or of the United States. We should never impose an obligation upon a community when we do not and cannot give that community the power to discharge that obligation. We should not require a county or a city to protect persons in their lives or property until we confer also upon them the power to furnish that protection.
>
> "I hold that this duty of protection, if it rests anywhere, rests on the State, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State."[66]

Representative Poland similarly found the Sherman Amendment defective because it purported to impose a liability where Congress had no power to impose the duty the neglect of which was to give rise to that liability:

> "The principle of this law is taken from the old hue and cry or hundred law . . . When property was taken in a hundred all the officers and all the inhabitants

[66] Globe 791.

were immediately to make hue and cry, on foot and horse, for the purpose of arresting the offender . . . It was made the duty by law of the officers of the hundred and all the inhabitants of the corporation to arrest the offender. If they arrested him that was the end of their liability . . . All those statutes, instead of being like this, enact this provision as a part of the police system. The first thing is to provide officers, prescribe their duties, and they may call everybody within their jurisdiction out and help put down the riot. If they fail to put down aggression upon the right of the people, for their neglect they may be made liable to the extent of damages done to property." [67]

The absurdity of imposing the liability for non-policing where Congress lacks the authority to impose the obligation to police was highlighted by Poland in these terms:

"But what would be thought of a national law which should impose a penalty upon the town in which a successful smuggler lived, or where an illicit distillery should be run, or give an action against the town for the loss of the Government in duties or taxes, by such operations? But it would equally be in the power of the national Government to do this as to enact this Senate amendment. I say again, it seems to me that legal gentlemen who support it cannot have given it proper thought." [68]

Representative Blair, too, focused upon Congress' lack of power to impose policing obligations upon municipalities:

"That amendment claims the power in the General Government to go into the States of this Union and

[67] Globe 794.

[68] *Id.*

lay such obligations as it may please upon the municipalities, which are the creations of the States alone. Now, sir, that is an exceedingly wide and sweeping power. I am unable to find a proper foundation for it.

. . . [H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to. The parallel of the hundred does not in the least meet the case. The power that laid the obligation upon the hundred first put the duty upon the hundred that it should perform in that regard, and failing to meet the obligation which had been laid upon it, it was very proper that it should suffer damage for its neglect. This is all there is of it.

"I have learned, sir—perhaps I have some old-fashioned prejudices—that in the Government of the United States there is a division of powers; that there are certain rights and duties that belong to the States, that there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, I ask gentlemen to tell me where its power will stop and what obligations it might not lay upon a municipality. If gentlemen say that the powers of the General and of State governments for the protection of life, liberty, and property are concurrent and that we can go everywhere throughout the United States and do by the General Government everything that can be done by any State government, then I grant that this power might exist; but until I am shown that, I am unable to see it . . . I must say that I think that if we have the right to lay this obligation upon them, to require them to meet these damages, it must draw after it the

power to go in there and say, 'you shall have a police, you shall have certain rules by which you may fulfill your obligation in this respect'."[69]

Representative Burchard noted that many municipalities had not in fact been delegated policing functions by the States, and declared that Congress lacked constitutional power to impose policing obligations upon municipalities when the States had not:

> "But there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance . . . But still in few, if any, States is there a statute conferring this power upon the counties. Hence it seems to me that these provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance."[70]

[69] Globe 795.

[70] Globe 795. The quotation in the text contains one sentence which is ambiguous: "And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed on a city by State laws, perhaps the United States courts could enforce its performance." In context, this sentence is completely consistent with our position, and with the central theme of Representative Burchard's remarks, that where a state delegates certain of its powers to a municipality, that municipality is bound when it exercises those powers to abide by the requirements of the Fourteenth Amendment. See also Globe at 791 (Rep. Willard). We recognize, however, that literally and in isolation it could be read to mean that no municipality is bound by the requirements of the Fourteenth Amendment unless the state chooses to make it so bound. In this connection, it is important to remember that statements made in these debates were often off-the-cuff, with loose and sometimes confused language. Thus, in analyzing these debates, it is critical to determine basic themes rather than to rely on random and isolated statements.

Representative Bingham, declaring that "the only power to charge a municipality for the destruction of property by a mob arises from the laws of the state," concluded that "a county, being the creature of the State and an integral part of it, can in no case be made responsible for mob violence save by force of the positive law of the State creating it."[71]

Finally, Representative Farnsworth repeated the theme—no obligation, no liability:

> "Congress can . . . impose no duty on a sheriff or any other officer of a county or city. We cannot require the sheriff to read the riot act or call out the *posse comitatus* or perform any act or duty. Nor can Congress confer any power or impose any duty upon the county or the city. Can we then impose on a county or other State municipality liability where we cannot require a duty? I think not."[72]

The House thereupon voted to reject the Conference Report, by a vote of 106-74.[73] Twenty-three supporters of the bill as a whole voted against the Sherman Amendment,[74]

[71] *Id.* at 794.

[72] *Id.* at 799.

[73] *Id.* at 800.

[74] Compare Globe 800 (vote on Sherman Amendment) with Globe 808 (vote on the final bill following removal of the Sherman Amendment). Had these 23 supported the Sherman Amendment, it would have been approved by a margin comparable to that which approved the final bill.

and their defections spelled the difference between defeat and victory for the Amendment. Of the 23, only the six we have quoted explained the basis for their opposition; but it is clear that others shared their concerns about the Amendment's encroachment upon the States' reserved police powers.[75]

The House's rejection of the Conference Report necessitated another conference, at which the Sherman Amendment was scrapped and the present 42 U.S.C. § 1986 substituted (making persons who have knowledge of an impending riot affecting federal rights liable to injured victims for failing to take whatever steps are in their power to prevent or aid in preventing the riot).[76]

Representative Poland, who had been one of the conferees, reported to the House the arguments which had persuaded the Senate conferees to recede from the Sherman Amendment. This passage is the *only* item of legislative history addressed to the status of municipalities quoted or cited in *Monroe:*

> "I did understand from the action and vote of the House that the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law. We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that the section imposing liability upon towns and counties must go out or we should fail to agree."[77]

[75] Thus, for example, four others among the 23 defectors had previously expressed concern about the bill's possible encroachment upon the state's police powers, in the context of the successful effort to amend Sections 2, 3 and 4. Rep. Garfield (Globe App. 149-155); Rep. Cook (Globe 478); Rep. Hawley (Globe 382); Rep. Sheldon (Globe 368).

[76] *Id.* at 804, 819-820.

[77] *Id.* at 804.

In *Monroe,* the Court apparently understood the word "obligation" in Representative Poland's report to mean "*financial* obligation," so that the gist of his statement was thought to be that there was a doubt as to Congress' "constitutional power to impose any [financial] obligation upon county and town organizations." It is plain, however, when the full debates are read, that Representative Poland meant "affirmative obligation," and that the full gist of his remarks was that there was a doubt as to Congress' "constitutional power to impose any [affirmative] obligation upon county and town organizations," and accordingly an unwillingness to impose a "liability" for non-performance of a duty [an "obligation"] which Congress could not require municipalities to perform.

V.

Correctly understood, the objections which led to the defeat of the Sherman Amendment were totally irrelevant to Section 1 of the bill. Section 1 imposed no obligations on "persons." It provided only that "persons" could be held liable for violating those obligations which the Fourteenth Amendment already imposed upon them; in the case of municipalities, the obligation to refrain from doing what "No state shall" do. Including municipalities under Section 1 thus constituted no invasion of the States' reserved powers. States retained their sole right to determine what functions, if any, they would delegate to municipalities. The Fourteenth Amendment already provided that in exercising *whatever* functions the states delegated to them, municipalities were required to refrain from denying due process, denying equal protection, etc. Section 1 merely made these existing obligations enforceable in federal court.

With the full legislative debates properly understood, two conclusions follow:

1. The holding in *Monroe* was erroneous. *Monroe* drew an inference that Congress meant to exclude municipalities

from the term "persons" in Section 1 *solely* from its misconception as to the reason for the defeat of the Sherman Amendment, 365 U.S. at 191:

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."

But however erroneous, this holding may be deemed to be *stare decisis.*[78]

2. *Monroe* did not, however, decide the issues posed in the instant case; it cannot be *stare decisis* as to them. We have shown that Congress did *not* have a desire to "protect municipal treasuries" against the cause of action created in Section 1. Congress erected no "shield" against the Fourteenth Amendment "sword." There is no Eleventh Amendment "analogy." There is nothing which stands in the way of effectuating the clear congressional will to make Section 1 reach as far as the Fourteenth Amendment allows it to go. The statute authorizes a federal court order requiring wrongdoing public officials to exercise "the power that is theirs" to provide *all* relief—including retroactive monetary relief from the public treasury—necessary "to make good the wrong done."

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[78] Cf. *Monroe*, 365 U.S. at 218-223 (Frankfurter, J., dissenting).